

BRB No. 98-1629

JAMES G. PETERS )  
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 Claimant-Respondent )  
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 v. )  
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 BETHLEHEM STEEL CORPORATION ) DATE ISSUED: 9/14/99  
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 Self-Insured )  
 Employer-Petitioner ) DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney's Fees and Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

John D. McElroy and Ed W. Barton (Law Office of Ed W. Barton), Orange, Texas, for claimant.

David B. Gaultney (Mehaffy & Weber, P.C.), Beaumont, Texas, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Supplemental Decision and Order Awarding Attorney's Fees and Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration (93-LHC-1028) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. See, e.g., *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

On June 2, 1988, claimant injured his back at work. He has not returned to work since that date but presently resides on his own farm where he performs various duties involving the raising of cattle. In his Decision and Order, the administrative law judge awarded claimant temporary total disability benefits from June 2, 1988, to April 16, 1994, and permanent total disability benefits thereafter, based on an average weekly wage of \$413.

Claimant's counsel subsequently submitted fee petitions to the administrative law judge, requesting an attorney's fee of \$33,458.65, representing 126.8 hours of attorney services at \$263 per hour, and 1.05 hours of paralegal services at \$105 per hour, plus \$4,041.39 in expenses, for a total of \$37,500.04. In his Supplemental Decision and Order, the administrative law judge found employer was liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a), and awarded the sum of \$14,761.25, representing 98.575 hours of service at hourly rates of \$150 for claimant's attorney and \$50 for his paralegal, and expenses in the amount of \$4,041.39, for a total of \$18,802.64. Upon claimant's motion for reconsideration, the administrative law judge additionally ordered employer to pay claimant's attorney the sum of \$4,785, representing 31.9 hours of attorney services at \$150 per hour, and \$40, representing .8 hours of paralegal services at \$50 per hour, for a total of \$4,825.00.<sup>1</sup> The administrative law judge also found that employer was liable for the fee awarded under Section 28(b) of the Act, 33 U.S.C. §928(b), rather than Section 28(a) as he had originally held.

Shortly after the administrative law judge issued his Order, the Board vacated the administrative law judge's award of total disability benefits, upon which the attorney's fee award was based, and remanded the case for reconsideration of the

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<sup>1</sup>The administrative law judge significantly reduced the requested fee for the following reasons: (1) he reduced the hourly rates from \$263 to \$150, and from \$105 to \$50 for the attorney and paralegal, respectively; (2) he disallowed some time for receipt, review, and preparation of one page letters; and (3) he denied all time for claimant's counsel's requests for extensions of time and preparation of the fee petition. Supplemental Decision and Order at 2-3, 5-7. The administrative law judge did not reduce the fee in light of the amount of benefits he awarded. Order at 3.

extent of claimant's disability. *Peters v. Bethlehem Steel Corp.*, BRB No. 97-1839 (Sept. 25, 1998)(unpub.).

On appeal, employer challenges the administrative law judge's award of an attorney's fee to claimant's counsel, contending that it is not liable for claimant's attorney's fee under Section 28(b) of the Act. Alternatively, employer contends that if it is liable for a fee under Section 28(b), the administrative law judge erred in not modifying his fee award to reflect the difference between the amount awarded to claimant and the amount paid to claimant by employer. Employer lastly contends that the fee award is premature as the underlying disability award on which the attorney's fee is based was vacated by the Board. Claimant responds, urging affirmance of the fee award, but acknowledging that remand of the attorney's fee award is appropriate pending the administrative law judge's award of disability benefits on remand.

Under Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that already paid or tendered by the employer. See *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995), *aff'g* 24 BRBS 84 (1990); 33 U.S.C. §928(b). Obtaining an increased average weekly wage for compensation purposes constitutes additional compensation within the meaning of Section 28(b). See *Bacon v. General Dynamics Corp.*, 14 BRBS 408 (1981). In the instant case, we affirm the administrative law judge's determination that Section 28(b) is applicable to this case, as at a minimum claimant established a higher average weekly wage than that utilized by employer in voluntarily tendering claimant benefits.<sup>2</sup> Moreover, employer contested the nature and extent of disability, and if claimant is ultimately successful in preserving this award, it would support a fee under Section 28(b). See *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148 (CRT)(9th Cir. 1998); *Bacon*, 14 BRBS at 408.

We agree with employer, however, that the amount of the fee awarded by the administrative law judge to claimant's counsel cannot be affirmed; specifically, in

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<sup>2</sup>The record reflects that employer voluntarily paid claimant temporary total disability benefits from the time of injury at the rate of \$236.87 per week based on an average weekly wage of \$355.30. Cl. Ex. 1-13. After a hearing was held, the administrative law judge issued his award of benefits to claimant based on an average weekly wage of \$413. Thus, claimant received an increase in his average weekly wage of \$57.70 before the administrative law judge, and this issue was not challenged on appeal to the Board.

light of the decision of the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), we hold that the administrative law judge's fee award must be vacated, and the case remanded for further consideration on this issue. In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Specifically, the Court created a two-prong test focusing on the following questions:

First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

*Hensley*, 461 U.S. 434; see also *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73 (CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). Where claims involve a common core of facts, or are based on related legal theories, the Court stated that the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. If a plaintiff has obtained "excellent" results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436.

In the present case, the Board has previously vacated the amount of benefits awarded to claimant and remanded the case for reconsideration of the extent of claimant's disability. Pursuant to this prior disposition, we vacate the fee award and remand the case for reconsideration of counsel's fee petition pursuant to *Hensley* and the administrative law judge's subsequent determination regarding the extent of claimant's disability and the amount of benefits due claimant.

Accordingly, the administrative law judge's Supplemental Decision and Order and Order are vacated, and the case is remanded to the administrative law judge for consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief

Administrative Appeals Judge

I concur:

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ROY P. SMITH  
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I am in full agreement with my colleagues that on remand the administrative law judge must determine the appropriate attorney's fee pursuant to Section 28(b) of the Longshore and Harbor Workers' Compensation Act, "based solely upon the difference between the amount awarded and the amount tendered or paid . . . ." 33 U.S.C. §928(b). In light of the statute, claimant's success in obtaining a higher average weekly wage than that on which employer based its payments does not automatically entitle him to an attorney's fee. Under Section 28(b), only if the sum ultimately awarded exceeds the amount employer paid is claimant entitled to any fee and the amount of the fee is based *solely* on the difference between these sums. See *George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 1536-1537, 25 BRBS 161, 165-166 (CRT)(D.C. Cir. 1992).

At this juncture, it is uncertain whether this litigation will result in any additional compensation for claimant since employer paid total disability compensation until the date of the award and the administrative law judge has yet to determine whether claimant's cattle ranching constitutes suitable alternate employment. Only after the administrative law judge recalculates claimant's award and subtracts from that sum the amount of compensation paid can he determine whether, pursuant to Section 28(b), claimant is entitled to an attorney's fee, and if so, the amount of the fee. See *Brooks*, 963 F.2d at 1532, 25 BRBS at 161 (CRT).

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REGINA C. McGRANERY

Administrative Appeals Judge